Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388 (5)

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

OBJECTION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY VIRGINIA BROWN, ET AL.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE

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Potomac Hospital Corporation,[1] Respondent herein, objects to the motion of

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[1]The Listing pursuant to rule 28.1 is stated in the Brief for Respondent in Opposition to Petition for a Writ of Certiorari.

Virginia Brown, Executrix of the Estate of Wilbur Brown, and 370 other individuals (Amicus Petitioners) represented by Robert R. Hatten for leave to file a Brief Amicus Curiae in this proceeding. The reasons why leave to file such Brief should be denied are as follows:

1. Rule 36.1 states that a Motion to file a Brief Amicus Curiae prior to consideration of the Petition for a Writ of Certiorari is not favored. Amicus Petitioners make their Motion prior to consideration of the Petition herein.

2. Judge McKenzie of the United States District Court for the Eastern District of Virginia has ruled in a case in which two Amicus Petitioners herein, Charles Wesley Mann, Administrator of the Estate of Elizabeth Francis Mann, and Francis Marion Cave, are plaintiffs, that the issue of settlement and release in the asbestos cases in which Amicus Petitioners

are involved will be governed by federal common law, and not by the decision of the Virginia Supreme Court herein, Potomac Hospital Corporation v. Dillon, 229 Va. __, 329 S.E.2d 41 (1985). See Mann v. H. K. Porter and Southern Textile Corp., No. 83-477-N Civ. (E.D. Va. July 8, 1985) and Francis Marion Cave v. Johns-Manville Corp., No. 77-738N (E.D. Va. July 8, 1985).

Amicus Petitioners' interest is not ripe. It is entirely probable, under the doctrine of stare decisis, that the Amicus Petitioners will never be subject to the Dillon decision. They therefore lack the interest necessary for amicus status.

3. Amicus Petitioners do not set forth any facts or questions of law which they contend have not been, or may not be, adequately presented by the parties. As counsel for Petitioner Dillon are retained counsel who have been present in the case since its inception, adequate presentation

of the facts and questions of law must be presumed, until shown otherwise.

4. The Attorney General of the Commonwealth of Virginia has filed a Brief Amicus Curiae in support of the Petition for a Writ of Certiorari by Dillon. If there is any inadequacy in the Petitioner's Brief, there is no reason to believe that the Attorney General's Brief will not compensate for it.

5. Amicus Petitioners raise no new issues, but merely restate and reargue the questions presented by Petitioner. Repetition is not the office of Amicus Curiae.

For the above reasons, the Motion of Virginia Brown, et al. should be denied.

Respectfully Submitted,

By: Robert H. J. Loftus

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Attorneys for Respondent:
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CERTIFICATE

I hereby certify that on the 21st day of October, 1985, a true copy of the foregoing Objection of Respondent to Motion for Leave to File Brief Amicus Curiae by Virginia Brown, et al. was mailed, postage prepaid, to Frank J. Ceresi, Esquire, 2300 South 9th Street, Suite 112, Arlington, Virginia 22204, Counsel for Petitioner; The Honorable William S. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, Virginia 23219; and to Robert R. Hatten, Esquire, Patten, Wornom & Watkins, 739 Thimble Shoals Boulevard, Suite 105, Newport News, Virginia 23606, Counsel for Virginia Brown, et al.

Robert H. J. Loftus

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v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF VIRGINIA BROWN, ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, Potomac Hospital Corporation, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

QUESTIONS PRESENTED

1. Whether the rational basis test applies to state legislation retroactively abrogating accrued causes of action and defenses, and requires reversal?

2. Whether unconstitutional retroactive state legislation must be enforced by a state court?

SUMMARY OF ARGUMENT

The rational basis test does not apply to local, non-economic legislation which retroactively abrogates accrued causes of action and defenses.

Equitable rules of restraint developed by this Court to limit its own decisions do not prevent a state court from interdicting unconstitutional state legislation.

ARGUMENT

I. THE RATIONAL BASIS TEST DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW.

Amicus Petitioners complain of the asserted failure of the Virginia Supreme Court to uphold Section 8.01-35.1(D) in the light of a "rational basis" inquiry, citing Usery v. Turner Elkhorn Mining Corp., 428 U.S. 1 (1976); Pension Benefit Guaranty Corp. v. R. A. Gary & Co., ___ U.S. ___, 104 S. Ct. 2709 (1984), and United States v. Locke, ___ U.S. ___ 105 S. Ct. 1785 (1985).

These cases support the application of the rational basis test to retrospective legislation where national economic legislation is at issue. These cases are not authority for the application of the rational basis test to state legislation retroactively abrogating substantive, accrued common law causes of action and defenses.

The proper standard for review of legislation which retroactively abrogates accrued causes of action and defenses was settled by this Court in Ettor v. Tacoma, 228 U.S. 148 (1913) and Coombs v. Getz, 285 U.S. 434 (1932), and confirms the result below.

Application of the rational basis test to § 8.01-35.1(D) would not produce a different result. No reason has been proffered to support the subsequent retroactive amendment of § 8.01-35.1. Amicus Petitioners merely cite the reason for the enactment of § 8.01-35.1, and cite no reason supporting the retroactive amendment embraced in § 8.01-35.1(D).

Amicus Petitioners assume, without addressing, that the Dillon decision was made under federal, rather than Virginia, constitutional grounds. As the Brief in Opposition to the Petition for a Writ of Certiorari filed herein by Respondent

demonstrates, Dillon was decided on state law grounds. The authorities cited by Amicus Petitioners fail to establish any error in the interpretation of the Virginia Constitution, and do not require a state court to apply the rational basis test to state legislation.

II. A STATE SUPREME COURT IS NOT REQUIRED TO GIVE EFFECT TO UNCONSTITUTIONAL LEGISLATION.

Amicus Petitioners argue that Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), mandates that even though Respondent's rights have been unconstitutionally abrogated by the Virginia legislature, the Virginia Supreme Court is powerless to protect Respondent's rights if the decision involves a new principle of law. Chevron is not authority for such a proposition.

Chevron set forth equitable principles which this Court will apply in determining whether to give retrospective effect to a

new principle of law announced by this Court. Chevron does not purport to take away the judicial power to interdict unconstitutional retroactive legislation such as is at issue in this case.

Chevron does not bind state courts in interpreting state constitutions. Amicus Petitioners do not present any authority that a state court's failure to follow Chevron in interpreting federal law presents a federal question within this Court's jurisdiction.

Moreover, Chevron does not apply to the Dillon decision, as Dillon did not apply a new principle of law, and did not overrule prior precedent, as has been demonstrated in the Brief in Opposition to the Petition for a Writ of Certiorari. As the Court in Dillon stated, its decision was controlled by its prior decision in Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750, (1984) where it held that retroactive

application of § 8.01-35.1 would violate due process. Dillon, 229 Va. at ___, 329 S.E.2d at 44-45.

Even if Dillon can be said to have presented an issue of first impression, its resolution was clearly foreshadowed.

Petitioner's agreement to release the other tortfeasors in this case was made on July 14, 1983. Four months prior to that date the United States District Court for the Western District of Virginia held § 8.01-35.1(D) to be an unconstitutional abrogation of the vested right of contribution. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983).

Dillon is in accord with the prior case law. Sixty years prior to Dillon, the Supreme Court of Virginia held that the rights of joint tortfeasors could not be abrogated retroactively. In Norfolk & Southern R. Co. v. Beskin, 140 Va. 744, 125

S.E. 678 (1924), the railroad company sought contribution from Beskin under a statute enacted subsequent to the accident which created a right of contribution. In holding that the railroad had no right to contribution, the Court stated:

> [W]hile the revisors of the Code . . . have by statute abrogated the doctrine [no contribution among tortfeasors] existing in Virginia, this statute did not become a law until after the commission of the joint tort, and therefore cannot affect the rights of the parties, as they are to be determined by the law as of the time of the accident.

Id. at 747, 125 S.E. at 679.

Amicus Petitioner's authorities do not presage a different result, and are distinguishable from the Dillon decision. Town of Danville v. Pace, 65 Va. (25 Gratt.) 269 (1874), held only that the defense of usury was not a vested right, on the grounds that no person can have a vested right in a penalty and forfeiture law.

Humble Oil v. Copley, 213 Va. 449, 192 S.E.2d 735 (1972), involved no question of vested rights, but rather the application of the Uniform Commercial Code to events happening after its effective date.

Brown v. Western State, 110 Va. 321, 66 S.E. 49 (1909), held that the Commonwealth of Virginia loses a statutory right of action against a private citizen when the Virginia legislature repeals the law creating the right of action, under the obvious logic that the legislature is the state, and can revoke its own rights.

Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942), held that a litigant had no vested right in a judgment of a trial court such as to preclude reversal by an appellate court. Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940), likewise held that a person has no vested right in an alimony decree.

Opinions of the Attorney General of Virginia are not precedent, Albemarle County v. Marshall, Clerk, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975), nor are denials of Petitions for Writs of Error by the Virginia Supreme Court, Shiflet v. Eller, 228 Va. 115, 122 n.2, 319 S.E.2d 750, 755 n.2 (1984). Amicus Petitioner's reliance on such opinions is misplaced.

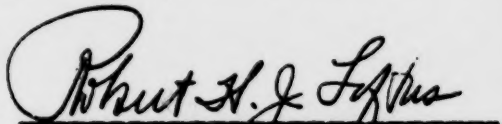
Hayman v. Patio Products, Inc., 226 Va. 482, 311 S.E.2d 752 (1984), did not involve any challenge to § 8.01-35.1(D) as an unconstitutional abrogation of vested or substantive rights.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), does not apply to this case, and does not require reversal.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully Submitted,

By: 

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